Public Prosecutor v Muhamad Izwan bin Rosdan

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-41H-47–04 OF 2021
NURULHUDA NURAINI JC
19 DECEMBER 2022

Road Traffic — Dangerous driving — Causing death — Different versions of accident — Accused charged under s 41(1) of Road Transport Act 1987 — Magistrate convicted accused under s 43 of Road Transport Act 1987 — Magistrate sentenced accused to fine of RM4,500 in default six months imprisonment — Whether accused was driving in dangerous manner — Whether magistrate was correct in amending charge — Whether sentence grossly inadequate — Whether magistrate had applied correct sentencing principle — Road Transport Act 1987 ss 41 & 43

The accused was initially charged with driving in a dangerous manner under s 41(1) of the Road Transport Act 1987 ('the RTA') which resulted in the death of the deceased, but the magistrate found that a different offence was proven under s 43 of the RTA, as such, the accused was called to enter defence on an amended charge of s 43 of the RTA. The accused pleaded guilty to the amended charge and was sentenced to a fine of RM4,500 in default six months imprisonment. The amendment of the charge was premised on the magistrate's finding that the only evidence proven by the prosecution was that an accident had happened when the accused collided into the deceased causing his death, and this itself being insufficient to prove driving in a reckless or dangerous manner under s 41 of the RTA. Aggrieved by the decision, the prosecution filed the present appeal. The issue to be determined in the present appeal was whether the accused was driving in a dangerous manner when he had overtaken a vehicle at a double line road and collided into the deceased's car or whether the accused was overtaking a vehicle at the right spot and the deceased had come out from a junction without a proper lookout in a vehicle without its lights on, had caused the collision with the accused. It ought to be noted that the accused's version as reflected in his police report had not been investigated by the investigating officer ('SP4') and the PUSPAKOM officer ('SP3').

Held, dismissing the appeal:

(1) The failure to investigate the accused's version by SP3 and SP4 had caused a gap in the prosecution's case as unless this version was refuted by showing either, firstly this defence was never suggested at all by the accused during the investigation and secondly, even if suggested, the fact remained that the version by the accused could not have been probable,

the end result was that there was doubt if the accused by overtaking another vehicle and collided into the deceased was, in that way driving dangerously (see para 15).

(2) Section 41 of the RTA, if convicted carried a serious repercussion that an offender shall be sentenced to a minimum imprisonment of two years and be disqualified from holding or obtaining a driving licence for a period with minimum of three years. As such, more evidence must be adduced to show that the accused was driving in a dangerous manner. In the present case, at the time of the incident about 5am in the morning, the big amount of traffic on the road at that time was negated by the prosecution witnesses themselves. Although the authorities referred to by the learned magistrate suggested that the accused could be said to be driving dangerously when overtaking on the face of oncoming traffic or overtaking when unable to see clearly, case law equally suggested that a person who turned into the side road without stopping to give way, especially when the deceased who was in a small route making a turning into a main road, could equally be said to be driving in a dangerous manner. Based on the above reasons, the learned magistrate was correct in amending the charge as permitted by s 41(4) of the RTA, to one under s 43 of the RTA ie, driving in a careless and inconsiderate manner (see paras 20–22).

(3) In relation to the sentence, the learned magistrate had considered that the accused had a probable defence and the fact that the incident happened in 2013 but the charge was only proffered in 2019 whereby the provision of s 43 of the RTA at the material time was 'fine of not less than RM4,000 and not more than RM10,000 and can be imprisoned for not more than 12 months'. The learned magistrate then passed a fine of RM4,500 in default six months imprisonment with the license to be endorsed with the said conviction, the accused being a first-time offender. The court found that the sentence passed by the learned magistrate was not manifestly inadequate and the magistrate in passing the sentence, had applied the correct sentencing principle. The learned magistrate had taken into consideration the element of public interest and at the same time balanced it with the interest of the accused (see paras 23–24).

[Bahasa Malaysia summary

Tertuduh pada mulanya didakwa memandu secara berbahaya di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('APJ') yang mengakibatkan kematian si mati, tetapi majistret mendapati kesalahan berbeza dibuktikan di bawah s 43 APJ, oleh itu, tertuduh dipanggil membela diri atas pertuduhan pindaan s 43 APJ. Tertuduh mengaku bersalah terhadap pertuduhan pindaan tersebut dan dijatuhi hukuman denda RM4,500 atau penjara enam bulan jika ingkar. Pindaan pertuduhan tersebut adalah berdasarkan dapatan majistret bahawa satu-satunya keterangan yang dibuktikan oleh pihak pendakwaan ialah

kemalangan telah berlaku apabila tertuduh bertembung dengan si mati menyebabkan kematiannya, dan ini sahaja tidak mencukupi untuk membuktikan pemanduan secara melulu atau berbahaya di bawah s 41 APJ. Terkilan dengan keputusan tersebut, pihak pendakwaan memfailkan rayuan semasa. Isu yang perlu ditentukan dalam rayuan semasa ialah sama ada tertuduh memandu dalam keadaan berbahaya apabila dia memotong kenderaan di jalan garisan berkembar dan melanggar kereta si mati atau sama ada tertuduh memotong kenderaan di tempat yang betul dan si mati telah keluar dari simpang tanpa pengawasan yang betul di dalam kenderaan tanpa lampunya dibuka, telah menyebabkan perlanggaran dengan tertuduh. Perlu diingat bahawa versi tertuduh seperti yang terdapat dalam laporan polisnya tidak disiasat oleh pegawai penyiasat ('SP4') dan pegawai PUSPAKOM ('SP3').

Diputuskan, menolak rayuan:

(1) Kegagalan untuk menyiasat versi tertuduh oleh SP3 dan SP4 telah menyebabkan terdapat jurang dalam kes pendakwaan kerana melainkan versi ini disangkal dengan menunjukkan sama ada, pertama pembelaan ini tidak pernah dicadangkan sama sekali oleh tertuduh semasa siasatan dan kedua, walaupun jika dicadangkan, fakta kekal bahawa versi oleh tertuduh adalah tidak berkemungkinan, keputusan akhirnya adalah terdapat keraguan sama ada tertuduh dengan memotong kenderaan lain dan melanggar si mati adalah, dengan cara tersebut memandu secara berbahaya (lihat perenggan 15).

(2) Seksyen 41 APJ, jika sabit kesalahan membawa kesan yang serius di mana pesalah hendaklah dihukum penjara minimum dua tahun dan hilang kelayakan daripada memegang atau mendapatkan lesen memandu untuk tempoh minimum tiga tahun. Oleh itu, lebih banyak keterangan perlu dikemukakan untuk menunjukkan bahawa tertuduh memandu dengan cara yang berbahaya. Dalam kes ini, ketika kejadian kira-kira jam 5 pagi, jumlah trafik yang besar di jalan raya pada masa tersebut telah dinafikan oleh saksi-saksi pendakwaan sendiri. Walaupun autoriti kes yang dirujuk oleh majistret yang bijaksana mencadangkan bahawa tertuduh boleh dikatakan memandu secara berbahaya apabila memotong di hadapan lalu lintas yang datang atau memotong apabila tidak dapat melihat dengan jelas, autoriti kes juga ada mencadangkan seseorang yang membelok ke simpang tanpa berhenti untuk memberi laluan, lebih-lebih lagi apabila si mati yang berada di laluan kecil membelok ke jalan utama, juga boleh dikatakan memandu dalam keadaan berbahaya. Berdasarkan alasan-alasan di atas, majistret yang bijaksana adalah betul dalam meminda pertuduhan seperti yang dibenarkan oleh s 41(4) APJ, kepada pertuduhan di bawah s 43 APJ iaitu, memandu dengan cuai dan tidak bertimbang rasa (lihat perenggan 20–22).

(3) Berhubung dengan hukuman, majistret yang bijaksana telah mempertimbangkan bahawa tertuduh mempunyai kemungkinan pembelaan dan fakta bahawa kejadian tersebut berlaku pada 2013 tetapi pertuduhan hanya dikemukakan pada 2019 di mana peruntukan s 43 APJ pada masa yang material adalah 'denda tidak kurang RM4,000 dan tidak lebih RM10,000 dan boleh dipenjarakan tidak lebih 12 bulan'. Majistret yang bijaksana kemudian menjatuhkan hukuman denda RM4,500 atau penjara enam bulan jika ingkar dengan lesen akan dilampirkan dengan sabitan tersebut dengan mengambil kira tertuduh merupakan pesalah kali pertama. Mahkamah mendapati bahawa hukuman yang dijatuhkan oleh majistret yang bijaksana bukanlah dengan jelas tidak mencukupi dan majistret dalam menjatuhkan hukuman tersebut, telah menggunakan prinsip hukuman yang betul. Majistret yang bijaksana telah mengambil kira elemen kepentingan awam dan pada masa yang sama mengimbanginya dengan kepentingan tertuduh (lihat perenggan 23–24).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Lim Chin Poh v PP [1969] 2 MLJ 159; [1969] 1 LNS 92 (refd)
PP v Ong Kia Chan [2006] 7 MLJ 230; [2006] 4 CLJ 334, HC (refd)
Ramiah v PP [1972] 2 MLJ 258; [1972] 1 LNS 120 (refd)

Legislation referred to

Road Traffic Ordinance 1958 (repealed by Road Transport Act 1987) s 34A
Road Transport Act 1987 ss 41, 41(1), (4), 43

Mohd Shahrul Ekhsan (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the prosecution.
Aqeeb Lizalman Nordin bin Zamry (Aqeeb & Co) for the respondent.

Nurulhuda Nuraini JC:

BACKGROUND

[1] The respondent accused was initially charged in year 2019 with driving a Proton Satria number WVM 9776 on 15 April 2013, in a dangerous manner under s 41(1) of the Road Transport Act 1987, resulting in the death of Mageswaran a/l Paramasiban. The deceased was in a Kancil car number WHF 4127.

[2] The charge reads as follows:

Bahawa kamu pada 15.4.2013 jam lebih kurang 5.30 pagi di KM 36 Jalan Klang Banting-Port Dickson dalam Daerah Kuala Langat, dalam Negeri Selangor sebagai pemandu motokar no. WVM 9776 didapati telah memandu kenderaan tersebut di atas jalanraya secara merbahaya tanpa mengendahkan suasana dalam keadaan (bentuk-bentuk, kegunaan jalan dan juga kesibukan di atas jalanraya yang boleh dijangkakan) sehingga menyebabkan kematian kepada pemandu motokar no. WHF 4127 bernama Mageswaran a/l Paramasiban (No. K/P 781123-10-5633). Oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987.

[3] The learned magistrate, after hearing all the four prosecution witnesses, came to a view that a different offence was proven under s 43, hence the respondent was called to enter his defence on an amended charge of s 43.

[4] The respondent pleaded guilty to the said amended charge and was sentenced to a fine of RM4,500 in default six months imprisonment. The license endorsed with the said conviction. The prosecution not being satisfied with the decision, had lodged a notice of appeal against that said decision. When the matter came up for hearing before this court, the prosecution put up an oral submission whilst the respondent a written one.

ISSUES BEFORE THE MAGISTRATE COURT

[5] There were no eye witnesses to the incident. The magistrate observed that there were two versions of the incident: one by the IO who said that the respondent had encroached onto the rightful lane of the deceased and had caused this accident. The defence's version was that the respondent accused was overtaking a vehicle before he came to the said junction when the deceased who was in a car but with no lights on, turned into the big road from the said junction and collided into the respondent. This version appears in the police report lodged by the respondent tendered as P3.

[6] The learned magistrate, despite making a finding that the accused respondent in fact was overtaking another vehicle as the debris of the collision was found on the deceased's lane thus the accused respondent was in the deceased's right of way, the basis in amending the original charge to s 43 by the trial judge was that the only evidence proven by the prosecution was that an accident had happened when the accused collided into the deceased causing his death, and this itself being insufficient to prove driving in a reckless or dangerous manner under s 41.

[7] This deduction can be attributed to the summarised evidences adduced in the prosecution case as found by the learned magistrate below:

(a) the accused respondent was driving his Satria travelling from Banting moving towards Klang whilst overtaking a car, collided into the deceased in Kancil who was on the opposite side;

(b) SP2 brother of the deceased who went to the scene at about 5.30am said the deceased who worked in the morning shift was on his way to work using the Jalan Kenanga route and would come to this junction before going into the main road Banting-Klang;

(c) there were not many cars on the street taken by the deceased that morning that would lead to the main road;

(d) the street was lighted with a lamp post at the end junction but SP2 agreed that the light was glim which was similarly said by the IO SP4;

(e) the PUSPAKOM officer SP3 examined both the vehicles brought to him after the incident and found both the cars were damaged on the right side of each cars but did not check if the lights of the vehicles could function or otherwise;

(f) the IO SP4 said it was a straightforward case of face to face collision that happened when the accused was overtaking a vehicle on the road where the deceased has the right of way;

(g) however, the magistrate found that the IO did not investigate the version put by the respondent as per the respondent's police report P3 that the deceased was coming out from the Jalan Kenanga street into the main road Banting-Klang;

(h) P3 represent the version said by the accused that had taken place where the accused said the deceased came out from the said junction into the main road;

(i) from the cross-examinations, it was suggested by the accused that the collision occurred because the deceased had made a turn into the main road at the junction with the car light not on;

(j) neither SP3 (PUSPAKOM) nor the IO SP4 had made any investigations on this;

(k) the main road which is a federal road with a speed limit of between 60 to 70km/hr, is divided by a double line as per the sketch plan P12; and

(l) the cause of death of the deceased was 'polytrauma secondary to motor vehicle accident'.

[8] In amending the said charge, the learned magistrate availed itself with the relevant authorities, although a repetition, a necessity to reproduce them here:

(a) in *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159; [1969] 1 LNS

92 where the meaning of the word 'driving in a dangerous manner' to mean:

> In my opinion the expression driving in a manner which is dangerous to the public indicates some dangerous act or manoeuvre on the part of the driver of a vehicle, eg, overtaking a vehicle on the wrong side of it, or *overtaking in the face of oncoming traffic or overtaking when unable to see oncoming traffic*, or crossing a junction against traffic light and so on. There must be some positive act on the part of the driver which is dangerous having regard to all circumstance.

(b) in *Public Prosecutor v Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334 Low Hop Bing J elaborated further as follows:

> In a case of dangerous driving, the prosecution must establish that:
>
> (a) *a situation created by the accused is dangerous eg, turning right into the side road without stopping to give way to through*; and
>
> (b) when creating such a situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances (per Raja Azlan Shah) in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258; [1972] 1 LNS 120.

(c) in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 at pp 258–259; [1972] 1 LNS 120, Azlan Shah J in discussing s 34A of the Road Traffic Ordinance 1958, which is pari materia with s 41(1) RTA, explained further the necessary relevant evidence for an offence under s 41 as follows:

> 'It is not the law under s 34A of the Road Traffic Ordinance *that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public*.
>
> ... In a case under s 34A, two things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the Court to come to a decision on the evidence ...
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> Secondly, the prosecution must prove that when creating such a situation the appellant must be at fault. 'Fault involves a failure; a failing below the care and skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances.

THE OBSERVATIONS BY THIS COURT

[9] The critical issue here is whether the accused respondent was driving in a dangerous manner when he had overtaken a vehicle at a double line road and collided into the deceased's car or whether the accused was overtaking a vehicle

at the right spot and the deceased had come out from the junction without a proper lookout in a vehicle without its lights on, had caused the collision with the accused.

[10] The learned magistrate was of the view that the prosecution had merely proven an accident happened face on with the deceased, with the accused being on the deceased's right of way but the magistrate did not address other available evidence on this issue clearly in his judgment. This leaves this court with the task to re-evaluate the evidence and make the necessary findings (see: *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC)).

[11] As stated in the earlier paragraph, in the sketch plan P12, the roads heading from Klang to Morib and from Morib to Klang are divided in the middle road by a double line. But, dotted dashed lines can be seen located near the centre of the junction. This logically so to permit cars coming out from the small lane of Jalan Kenanga into the main road of Klang-Morib and for cars on the main road making a turn into the small lanes.

[12] The police report P3 lodged by the accused did not state the material point of his defence that the car light of the deceased was not on but the other significant point that the deceased had suddenly come out from the lane into the main road is reflected in P3. The critical point that the deceased was driving without the car lights on was suggested to SP3 and SP4 (IO) in cross-examination. No investigation was carried out by SP3 and SP4 on both this aspect as in P3 and the suggested defence.

[13] The prosecution did not ask why there was no investigation carried out neither did the IO SP4 said anything to the effect that the accused's statement did not disclose this important defence hence suggesting a belated defence.

[14] As to the police report P3 that did not contain the other vital defence suggesting that the deceased was equally to be blamed for driving in an unlighted vehicle, *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 (FC) where it was ruled that a police report is not meant to be encyclopaedic:

> the first information report is not an encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only of the investigation stage that all the details can be gathered and filled up.

[15] Thus, to this court's view the accused respondent should not be penalised for failing to state this defence in his police report as he still has the opportunity to suggest or explain further in his statement taken during the investigation. The fact that the respondent's statement was taken was confirmed by SP4. However, the failure to investigate this by SP3 and SP4 had

caused a gap in the prosecution's case as unless this version is refuted by showing either, firstly this defence was never suggested at all by the accused during the investigation and secondly, even if suggested, the fact remained that the version by the accused could not have been probable, the end result is that there is doubt if the accused by overtaking another vehicle and collided into the deceased was, in that way driving dangerously.

[16] As highlighted earlier, the sketch plan P12 shows double line on the road until nearer to the junction where there are dotted dashed lines. The point of impact marked as 'X' by SP4 suggests where the collision happened. The marking of dotted dashed lines on the road means a vehicle is allowed to overtake when the situation of the traffic permits and this right to overtake, was what the accused had exercised at that material time.

[17] The photographs taken and tendered as P6(A-N) were not clearly explained by SP4 with photographs P6(D-F) appears to show double line and double dotted or dashed lines all described as 'lokasi kemalangan' but no further elaboration on this relevant fact to give rise to an inference that the accused respondent was driving in a dangerous manner when he committed wrong under the law by overtaking at an unpermitted part of the road.

[18] Looking at P12, a deduction can be made that the drawing of the sketch plan was not done according to actual measures as one can note that the dotted or dashed lines appears to stretch longer if one turns right from the said Jalan Kenanga lane into the main road but there was no measurement made to show how long the exact stretch of this dotted dashed lines are, even before reaching the junction to Jalan Kenanga, from Banting-Klang route, the route the accused respondent was travelling on.

[19] Hence, for this court to make a mathematical calculation and infer that the accused had overtaken a vehicle at a double line road resulting in the accused respondent driving in a dangerous manner that ended with a collision with the deceased, and having regard to the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road, to this court's view is not safe.

[20] Section 41, if convicted carries a serious repercussion that an offender shall be sentenced to a minimum imprisonment of two years and be disqualified from holding or obtaining a driving licence for a period with minimum of three years. Relying on the authorities cited above, more evidence must be adduced to show that the accused respondent was driving in a dangerous manner. To recap, at the time of the incident about 5am in the morning, the big amount of traffic on the road at that time was negated by the prosecution witnesses themselves SP2 and SP4.

[21] The authorities referred to by the learned magistrate highlighted in this judgment, although on one hand suggest that the accused could be said to be driving dangerously when overtaking on the face of oncoming traffic or overtaking when unable to see clearly, case law equally suggest that a person who turn into the side road without stopping to give way, especially when the deceased who was in a small route making a turning into a main road, can equally be said to be driving in a dangerous manner.

[22] For all these reasons, this court is of the view that the learned magistrate had come to a correct decision in amending the charge as permitted by s 41(4) of the Act, to one under s 43 driving in a careless and inconsiderate manner.

WHETHER SENTENCE PASSED GROSSLY INADEQUATE

[23] As to the sentence, having considered that the accused respondent has a probable defence and the fact that the incident happened in 2013 but the charge was only proffered in 2019 (based on the case number at the lower court BG-83–117–02 of 2019), the provision of s 43 at the material time was 'fine of not less than RM4,000 and not more than RM10,000 and can be imprisoned for not more than 12 months'. The learned magistrate had passed a fine of RM4,500 in default six months imprisonment with the license to be endorsed with this said conviction, the accused being a first-time offender.

[24] The sentence passed by the learned magistrate is not manifestly inadequate and the magistrate in passing the sentence, had applied the correct sentencing principle. The learned magistrate had taken into consideration the element of public interest and at the same time balance it with the interest of the accused. For these reasons, the appeal against sentence is also dismissed.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar